Elizabeth Johnson
Historic Preservation Officer
City of Missoula
435 Ryman St.
Missoula, MT 59802

MISSOULA CITY COUNCIL
SITTING AS THE BOARD OF ADJUSTMENT

In the Matter of FAE Missoula Hospital, LLC's Appeal of the March 5, 2025, Missoula Historic Preservation Commission Decision	CITY OF MISSOULA'S RESPONSE BRIEF FOR THE CITY COUNCIL APPEAL HEARING

This brief serves as the City of Missoula's response to FAE Missoula Hospital, LLC's appeal of the decision by the Historic Preservation Commission to deny an application for a permit to demolish the Fort Missoula Post Hospital. The developer argues the Commission erred in its decision. The City disagrees. The Commission did not err but instead acted within its discretion provided by the law and its decision was supported by substantial evidence on the record when reviewed in light of the Commissioners' experience in historic preservation. Because the Commission did not err, the City Council sitting as the Board of Adjustment in this appeal must uphold the Commission's decision to deny the permit.

The City Council is well aware of the special character of the Fort Missoula Historic District and one of its most prominent buildings, the Post Hospital. The law

protects that special character, placing a high burden on a developer who wishes to change it – with demolition being the most drastic of changes. As the City Council considers the decision before it, it should remain mindful of the codified public policy regarding applications for demolition of historic structures:

> The demolition or relocation of properties…listed on the National Register of Historic Places are considered significant actions, as historic sites and structures are community resources and contributing elements to the character of Missoula. The removal of historic resources alters the established character of the neighborhoods of which they are a part. An application to demolish or relocate an historic resource is held to a **very high standard**, requiring submittal of comprehensive and detailed application materials.

20.85.085.J.1.(a), MMC (emphasis added). With this in mind, this brief shall provide a factual and procedural background to explain the posture of the appeal, a discussion of City Council's standard of review and authority, and an analysis of the Commission's decision. The City is not advocating for or against the demolition of the Post Hospital in this brief – it is simply demonstrating how the Commission properly considered the evidence presented to it and issued a sufficiently-justified decision. In the absence of an error by the Commission, the law requires City Council to uphold the Commission's decision.

I. Factual and Procedural Background.

The present hearing is an appeal of the decision of the City of Missoula Historic Preservation Commission ("Commission") to deny a Historic Preservation Permit ("HPP") to FAE Missoula Hospital, LLC ("FAE") for the proposed

demolition of the Post Hospital building located at 3255 Lt. Moss Road in Missoula, within the boundaries of the Fort Missoula Historic District and Fort Missoula Neighborhood Character Overlay.

The Commission's unanimous decision was the culmination of a lengthy process. While some may argue that the demolition proposal process began when FAE initially purchased the property at Fort Missoula in 2019, from the City's perspective the process did not begin in earnest until shortly after the City Council denied FAE's application for new construction to develop the Post Hospital and adjacent properties in February 2024. In any case, after City Council's 2024 decision, FAE notified the City of its intent to seek a demolition permit for the Post Hospital and met with the City's Historic Preservation Officer ("HPO") on April 10, 2024, for a pre-application meeting. FAE provided an advisory presentation on its proposed demolition to the Commission during the Commission's regularly-scheduled meeting on June 5, 2024. The HPO then worked closely with FAE's representatives to complete its application for the demolition permit.

In accordance with Section 20.85.085.J.7, MMC, the HPO deemed FAE's permit application complete on January 30, 2025, and issued a Staff Determination on February 27, 2025. In this Staff Determination, the HPO recommended that the Commission preliminarily approve the permit, with conditions. The Commission then set the matter for a hearing, gave public notice, and received written comments

from the public. The Commission held the public hearing on March 5, 2025. At the hearing: (i) the HPO presented their findings and conclusions about the application, as stated in their Staff Determination; (ii) FAE's representatives and agents then presented their reasoning and justification in support of its application; and (iii) members of the public and organization representatives provided input. The Commissioners then asked many questions, mostly of FAE, and openly deliberated. In a vote held at the end of the hearing, the Commissioners unanimously denied FAE's HPP application. As required by law, the Commission, through the HPO, issued its written Record of Decision on March 27, 2025. FAE timely appealed.

FAE's full demolition permit application and supporting documents, the HPO's Staff Determination, the public's written comments provided before the March 5 hearing, the video recording and transcript of the March 5 hearing, and the Record of Decision are all part of the record here for consideration by the City Council in its present decision.

II. Standard of Review and Decision Authority.

Title 20 of the Missoula Municipal Code provides the standards and procedures that guide the HPO and Commission in considering historic preservation permit applications, including those for demolition, and provides the standards and procedures for the City Council when hearing an appeal of a Commission's decision.

Specifically, Section 20.85.085.J, MMC governs historic preservation permit applications for demolition, and Section 20.85.100, MMC governs appeals.

When a Commission's decision is appealed, the City Council sits in place of the Board of Adjustment. *See* 20.85.100.A. The Code gives the Commission's decision a presumption of correctness and places the burden of persuasion on the appellant. *See* 20.85.100.G. City Council can sustain an appeal (*i.e.*, overturn the Commission's decision) only if it finds that the Commission "erred." *See* 20.85.100.H.

Following a required public hearing, the City Council must render a decision, and it generally has three options: (1) overturn the Commission's decision and approve the permit, or approve it with conditions; (2) uphold the denial of the permit; or (3) remand the decision back to the Commission with direction for reconsideration based on the City Council's findings. *See,* 20.85.100.G, MMC. The City Council's decision must be supported by written findings of fact, to be issued at the same hearing or subsequent meeting. *Id*.

III. Analysis of FAE's Application and the Commission's Decision on it.

A. Legal Requirements for Historic Demolition Permit Applications.

Permits for demolition are governed by Title 20 of the Missoula Municipal Code, and the Code places the burden of proof and persuasion on the persons applying for them. Because FAE's application seeks a permit to demolish the

historic, protected Post Hospital, the application must satisfy certain criteria. Specifically, FAE as the applicant must demonstrate to the Commission that:

> (1) Denying the application will cause unreasonable economic hardship to the viability of the property;
> (2) That the applicant has made a **bona fide** effort to find a reasonable alternative that would result in the preservation, renovation, or adaptive reuse of the historic resource; and
> (3) That conditions necessary to mitigate the effects of approved demolition/relocation are developed.

Section 20.85.085.J.1(c) (emphasis added).[1] Accordingly, the Code instructs the Commission for reviewing demolition applications as follows:

> Preliminary approval will be established during the public hearing if the Historic Preservation Commission finds that failure to issue a permit will result in unreasonable economic hardship to the viability of the property, and that a bona fide effort has been made to find reasonable alternatives that would result in the preservation, renovation, or adaptive reuse of the historic resource, and no reasonable alternatives exist.

Section 20.85.085.J.8(c). The Code further develops these criteria in its instruction to the Commission, mandating a consideration of the following factors:

> a. Whether the structure still maintains viable economic life.
> b. Whether the structure is capable of generating a reasonable economic return if preserved, restored or rehabilitated.
> c. Whether the applicant has made a bona fide effort to find a reasonable alternative that would result in the preservation, renovation or rehabilitation of the structure.

[1] "Bona fide" is defined as: "A diligent effort on behalf of the applicant resulting in substantive and collaborative dialogue between all parties involved regarding economic and public interest, and a willingness of the applicant to provide any information requested and as required." 20.85.085.J.3, MMC.

Section 20.85.085.J.9. The Code then requires the applicant to provide specific types of evidence to address these review criteria, including a "Certificate of Economic Hardship," a "Feasibility Study/Economic Analysis Return," and a "Bona Fide Attempt to Rent, Sell or Relocate Resource," and the Code has lengthy requirements for each. *See* 20.85.085.J.10, MMC.

Finally, and as especially applicable here, the Code provides:

> The Historic Preservation Commission should consider the evidence utilizing the following guiding questions: Is the evidence sufficient? Is the evidence relevant? Is the evidence competent? Is the evidence credible? Is the evidence consistent? The Historic Preservation Commission **should also consider any evidence of self-created hardship through deliberate neglect or inadequate maintenance of the property under 20.85.085.K**.

Section 20.85.085.J.8(d) (emphasis added). Section 20.85.085.K, MMC, which is incorporated into the review process by this reference, provides a detailed definition of "Demolition by Neglect." Notably, the Code does not make "Demolition by Neglect" a factor to be considered by the HPO in the HPO's part of the process but instead reserves it for the Commission to consider.

The City concedes that the Code's guidance to the Commission on reviewing demolition permit applications is not a model of clarity. However, its thoroughness and repeated emphasis on certain factors reflect the "very high standard" placed on applicants who seek to demolish a protected, historic building. Further, the Code does not provide black-and-white, check-the-box standards for review by the

Commission. If decisions to demolish historic structures were that simple, there would be no need for Commissioners with "professional experience in such fields as architecture, history, architectural history, landscape architecture, archeology, city planning, preservation law, historic preservation…" as currently required by law. *See* 20.90.030.B (defining membership in the Historic Preservation Commission). The standards of review are not binary nor fully objective – they require experienced personnel to weigh the evidence. Accordingly, the Commission has great discretion in its review and decisions on demolition permits. The Commission properly exercised that discretion in this case.

B. The Commission Found Two Major Deficiencies in FAE's Application.

As outlined in the Commission's March 27, 2025, Record of Decision, the Commission found two significant deficiencies in FAE's HPP Application which led the Commission to deny it. First, the Commission was unpersuaded by FAE's evidence that a failure to issue the demolition permit would result in an unreasonable economic hardship to the viability of the property. Second, the Commission found insufficient evidence of a bona fide effort by FAE to find reasonable alternatives that would result in the preservation, renovation, or adaptive reuse of the property. Because these two deficiencies address essential elements to a demolition application, the Commission's denial of the permit was fully justified.

Unreasonable Economic Hardship. Regarding the first deficiency, the Record of Decision cites inadequate evidence regarding FAE's costs of operation and maintenance of the property for the past six years since FAE has owned it. Given FAE's duty to preserve the Post Hospital as its owner, the Commissioners were unimpressed with FAE's documented efforts and instead heavily weighed the evidence suggesting that FAE had failed to protect the building. Because this evidence directly impacts the economic viability of the property (*i.e.*, by decreasing it), the Commission found FAE to be at fault for a self-created hardship and demolition by neglect as provided by Section 20.85.085.K, MMC. The evidence in the record supports these conclusions.

First, FAE's HPP application lacked sufficient, convincing information regarding FAE's maintenance and upkeep of the building under FAE's ownership. When Commissioner Herzog asked about the costs provided in the application, FAE offered no information to show it had performed any maintenance to address the failing, leaking roof – despite FAE's knowledge of the destructive leaks. Additionally, FAE disabled the building's heating system which subjected the building to harsh freeze/thaw conditions during the winter and, in the professional opinions of the Commission members, this exacerbated moisture damage to the building. FAE's HPP application also concedes that FAE did not remove downed trees lying against building in a timely manner; and to the Commissioners this

further evidenced FAE's neglectful upkeep of the building to date. Thus, FAE contributed to the deterioration of the building's roof, walls, and horizontal and vertical supports through inadequate maintenance.

Second, contrary to FAE's insistence that there is no evidence that building's condition worsened under its ownership, the record clearly shows that FAE admitted to not fixing the leaking roof and admitted the building sustained significant vandalism damage during its ownership. In the Architectural Letter of Structural Conditions Assessment dated November 11, 2024, provided in the HPP application, David Gray states: "Vandals have destroyed a large quantity of historic windows and doors while the building was being reviewed for the previous Preservation application which has only increased over the last year." (HPP App, p. 23.) Despite FAE's claims of taking reasonable steps to prevent ongoing damage, the record shows that FAE failed to adequately secure the building for at least the first five years of ownership. FAE's insufficient efforts to secure the building from vandals and the failure to effectively waterproof the building, including broken windows and doors, accelerated the building's decline.

Third, some of FAE's application materials regarding the condition of the building were outdated, and updated materials were not available to the Commission to allow the Commission to verify FAE's claims regarding the building's current condition. The photographs provided in FAE's application were from 2019 and FAE

had not renewed the website link included in the application to allow the Commission to fully see the current condition of the building. When the Commissioners asked if that link could be made available to them, FAE confirmed it could not. FAE seemingly acted as if the burden was on the Commission to disprove FAE's claims on economic viability rather than acknowledging how the law places the burden of evidence and persuasion on FAE.

Thus, because the evidence in the record supports the Commission's conclusion that FAE had not demonstrated that the failure to issue the demolition permit would result in an unreasonable economic hardship to the viability of the property, the Commission's decision to deny the application was within its discretion.

Insufficient Bona Fide Efforts at Alternatives. Regarding the second deficiency, the Record of Decision cites inadequate evidence of FAE's efforts to work with other organizations to become eligible for grants and obtain other funds, to phase development to allow for different sources of funds, or to adaptively reuse the building. The Record of Decision cites as one basis for the lack of effort the fact that FAE never hired a qualified structural engineer to evaluate the building (or if FAE did, it did not use that evaluation in any apparent way), which led to an under-informed assessment of the building's integrity. This ignorance of the building's

integrity foreclosed alternatives that could have been available. The evidence in the record supports these conclusions.

First, FAE's HPP application gave little attention to the requirements of Section 20.85.085.J.10(a) in its economic assessment, specifically the requirement to factor in all available financial incentives, such as historic tax credits. While the application demonstrates that FAE e-mailed a few entities about the availability of grant funds and/or tax credits, additional application materials and information provided during the public hearing indicated FAE did not seriously consider possible financial incentives because: (a) in FAE's estimation, not enough funding is available to cover the full rehabilitation costs; (b) tax credits are "not applicable since these are…applied toward future net income streams and not directly for construction or rehabilitation costs" (HPP App., p. 71); and (c) FAE insisted that this project be exclusively privately funded. This reasoning is contrary to the clear requirements in Section 20.85.085.J.10(a)(7) MMC for a comparative economic assessment for the utilization of all financial incentives currently available.

Second, FAE did not demonstrate to the Commissioners that both parts of the feasibility study were completed by professionals meeting the required qualifications. Barron Peper from an outfit named Architecture of Belonging provided the Architect's Feasibility Letter included in the HPP application, but FAE could not provide a CV/resume for Mr. Peper and was unaware if he has any historic

preservation experience, as required by Section 20.85.085.J.10(b). Due to the uncertainty of Mr. Peper's qualifications, coupled with the lack of verifiable involvement of a structural engineer, the validity of the feasibility study's statement as to the building's suitability for continued use, renovation, restoration or rehabilitation was found to be insufficient. The Commission was justified in this conclusion.

Third, the Commissioners stated they had recommended and encouraged FAE to consider additional adaptive reuse projects for the building as early as 2022 and the HPP application shows that despite that recommendation, FAE only considered two options: sale and relocation of the building, and adaptively reusing the building for professional office spaces. FAE did not explore phased development, alternative adaptive reuse projects, and financial partnerships to offset the cost of rehabilitation, leading to an incomplete assessment of the building's financial viability.

Thus, because the evidence in the record supports the Commission's conclusion that FAE was not diligent in its efforts to find reasonable alternatives to demolition, the Commission's decision to deny the application was within its discretion.

C. FAE's Appeal Letter Relies on Unsupported, *Ad Hominem* Attacks and Unsound Arguments.

The City wishes to warn the City Council against placing any weight on distracting and unsupported arguments in FAE's Appeal Letter dated April 21, 2025. In this letter, FAE makes repeated attacks on the integrity and qualifications of several Commissioners, including Chairperson Paul Filicetti. These *ad hominem* arguments are unsupported by facts on the record and have no bearing on whether FAE's HPP application was sufficient under the law. FAE's Appeal Letter complains bitterly of the questions posed by the Commissioners during the March 5 hearing as if it is evidence of their bias – it is not, it is evidence of diligence. The Commissioners, especially the "professional" ones, have a right and are in fact expected to bring their expertise and experience into deliberations. They have the prerogative to disagree on the meaning of evidence produced by a developer – but again, this is not evidence of bias and a pre-formed decision but is rather evidence of a search for the truth. Presenting better evidence is more effective than questioning Commissioners' qualifications. FAE's personal attacks on the Commissioners are counterproductive and the City Council should disregard them.

Finally, FAE's Appeal Letter misapprehends the strength and meaning of the HPO's conclusions as presented in their February 27, 2025, Staff Determination. The Missoula Municipal Code expressly circumscribes the HPO's role in the permit application process. The HPO is not the decision-maker. The HPO reviews applications for their *prima facie* compliance with the several Code requirements

and can make a recommendation based on the content – but the ultimate judge of the content is the Commission. Section 20.85.085.J.8(d), MMC, clearly tasks the Commission, and not the HPO, with considering the evidence provided for sufficiency, relevance, competence, credibility and consistency and directs the Commission to consider any evidence of self-created hardship through deliberate neglect or inadequate maintenance of the property. While the HPO's conclusions and recommendations are entitled to some weight, the Commission has the unfettered authority to disregard them. This is especially the case when the Commission receives written and live comments from the public, has the opportunity for live questioning of an applicant's representatives, as is able to deliberate as a group. By design, the Commission is better informed than the HPO at the time of the decision, so the Appeal Letter's repeated reliance on the HPO is not sound. City Council should place little weight on it.

IV. Conclusion.

The Missoula Municipal Code asks a lot of the Historical Preservation Commission. For no financial remuneration at all, the Code asks Commissioners to make difficult decisions that will affect Missoula for generations to come. In recognition of their difficult task, the Code respects the Commissioners' decisions by granting them a presumption of correctness and placing a high burden on challengers to them. Here, appellant FAE has not met this burden.

The Code clearly gives discretion to the Commission in weighing the evidence presented for and against FAE's application to demolish the Post Hospital. The Commission acted within that discretion and its decision is supported by substantial evidence on the record when reviewed in light of the Commissioners' experience in historic preservation. Thus, its decision to deny FAE's HPP application was not erroneous and the City Council must uphold it.

Dated this 23rd day of May, 2025.

/s Elizabeth Johnson
Elizabeth Johnson
Historic Preservation Officer